STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL SCOTT APGAR, Defendant-Appellant.	FOR PUBLICATION November 9, 2004 9:05 a.m. No. 247544 Wayne Circuit Court LC No. 02-012129-01 Official Reported Version

Before: Murphy, P.J., and O'Connell and Gage, JJ.

MURPHY, P.J. (*concurring in part and dissenting in part*).

I respectfully concur in part and dissent in part. I agree that *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and its interpretation of MCL 768.32(1), dictate that third-degree criminal sexual conduct (CSC-III), as prosecuted here under the subsection regarding thirteen - through fifteen-year-olds, MCL 750.520d(1)(a), is not a necessarily included lesser offense of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(d) or (1)(e), rather it is a cognate lesser offense, and thus should not have been presented to the jury for consideration. I disagree with the proposition that we are nonetheless permitted to affirm the conviction on the basis that defendant's due process rights were not infringed when the jury was instructed on CSC-III because defendant had sufficient notice and all elements of the crime were proven by evidence that was admitted without objection. Although I am troubled by the outcome that, in my opinion, must be reached in this case, our Supreme Court's ruling in *Cornell* and its progeny require reversal.

"MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *Cornell*, *supra* at 357; see also *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003)("Instructions on cognate lesser offenses are not permitted[.]"). Even with a necessarily included lesser offense, an instruction cannot be given unless a rational view of the evidence would support the instruction. *Mendoza*, *supra* at 533, 545; *Reese*, *supra* at 446; *Cornell*, *supra* at 357.

None of the cases cited above supports the position that a cognate lesser offense instruction may still be permissible or allowed to stand if due process rights are not offended and there exists evidence to support a finding of guilt for the cognate lesser offense. If such were the case, the Supreme Court would not have undergone such extensive analysis distinguishing

between necessarily included lesser offenses and cognate lesser offenses in cases such as *Cornell* and *Mendoza.* For example, in *Mendoza,* the Court spent considerable time and effort in determining that manslaughter is a necessarily included lesser offense of murder. *Mendoza, supra* at 533-544. This conclusion permitted the Court to move on to the question whether a rational view of the evidence supported an involuntary-manslaughter instruction, with an ultimate finding that the evidence did not support a manslaughter instruction. *Id.* at 544-548.

If due process and evidentiary support permit the affirmance of a guilty verdict that was premised on a cognate lesser offense instruction, one questions why the *Mendoza* Court did not simply sidestep the analysis delineating manslaughter from murder and conclude that, irrespective of whether manslaughter is a cognate lesser offense or a necessarily included lesser offense, there was insufficient evidence to support a manslaughter instruction. It did not undertake such an approach because the distinction between cognate lesser offenses and necessarily included lesser offenses has meaning for purposes of MCL 768.32(1). A court does not reach the issue whether a rational view of the evidence supports an instruction unless and until a finding has been made that a necessarily included lesser offense is at issue. Concisely stated, "[i]nstructions on cognate lesser offenses are not permitted[.]" *Lowery*, *supra* at 173. The lead author here, in effect, obliterates the line drawn by our Supreme Court between cognate and necessarily included offenses. A court cannot examine the evidence and matters of due process if a cognate lesser offense is at issue.

MCL 768.32(1) provides:

> [U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Taking into consideration the Michigan Supreme Court's construction of the statute, a jury or judge can find a person guilty of CSC-I, or necessarily included lesser offenses of CSC-I, but the trier of fact is not permitted to find a person guilty of a cognate lesser offense as in the case before us today. Without a CSC-III instruction, which was precluded by law, there would have been no conviction.

The reliance of the lead opinion author on *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), is misplaced. In *Hunt*, the issue was whether "the district judge who presided over the defendant's preliminary examination erred in denying the prosecutor's motion to amend count II to charge third-degree criminal sexual conduct, instead of gross indecency between males." *Id.* at 360. Our Supreme Court held that there were sufficient proofs presented at the preliminary examination to support a bindover of the defendant on either charge and that the amendment would not have caused prejudice because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *Id.* at 363-365. The Court directed the district court, on motion of the prosecutor, to amend the charge on remand. *Id.* at 365.

Hunt was not decided in the context of a trial and jury instructions, and it did not implicate in any manner MCL 768.32(1). Rather, it merely addressed the ability of a prosecutor

to amend the information on the basis of evidence adduced at a preliminary examination before a trial. As noted by the *Hunt* Court, the right to a preliminary examination is a creation of statute and not a matter of federal or state constitutional requirement; it serves to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed the crime. *Hunt, supra* at 362. A defendant is not convicted of a crime pursuant to a preliminary examination ruling, and *Hunt* has no bearing on our case. Here, the prosecutor sought to amend the information before trial to add a count of CSC-III, but this request, which I believe should have been approved for the reasons enunciated in *Hunt*, was rejected by the trial court and is not before us. Once the trial court denied the request to amend the information, the case proceeded to trial and was subject to the requirements of MCL 768.32(1) and the case law interpreting the statute.

I would reverse.

/s/ William B. Murphy